

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

AN ACT *to repeal* 146.37; *to amend* 146.55 (7), 187.33 (3) (a) 5., 187.43 (3) (a) 5., 655.27 (1m) (b) and 655.27 (5) (a) 1. and 2.; and *to repeal and recreate* 146.38 of the statutes; relating to: confidentiality of health care review records and immunity.

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*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be provided in a later version.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 146.37 of the statutes is repealed.

**SECTION 2.** 146.38 of the statutes is repealed and recreated to read:

**146.38 Health care quality improvement activity. (1) DEFINITIONS.** In this section:

(a) "Adverse action" means any action or recommendation to reduce, restrict, suspend, deny, revoke, or fail to renew any of the following:

1. The quality of care provided by a health care entity or the quality of services provided by a health care entity that have an impact on care.
2. Morbidity or mortality related to a health care entity.
3. The qualification, competence, conduct, or performance of a health care entity.
4. The cost or use of health care services and resources of a health care entity.
5. Compliance with applicable legal, ethical, or behavioral standards for a health care entity.
6. Compliance with credentialing, accreditation, or regulatory standards for a health care entity and performance of credentialing, accreditation, or regulatory activities, including compliance with or performance of periodic performance reviews and related activities for the Joint Commission on Accreditation of Healthcare Organizations.
7. The approval or credentialing of a health care entity.

(e) "Records" includes minutes, files, notes, reports, statements, memoranda, databases, findings, work products, and images, regardless of the type of communications medium or form, including oral communications, and whether in statistical form or otherwise.

(f) "State agency" means a department, board, examining board, affiliated credentialing board, commission, independent agency, council, or office in the executive branch of state government.

**(2) IMMUNITY FOR ACTS OR OMISSIONS.** (a) No person acting in good faith who participates in a quality improvement activity is liable for civil damages as a result of any act or omission by the person in the course of the quality improvement activity. Acts or omissions to which this subsection applies include censuring or reprimanding a health care entity, revoking the hospital staff privileges of a health care entity, giving notice to the medical examining board or podiatrist affiliated credentialing board under s. 50.36, or taking any other disciplinary action against a health care entity.

\*\*\*\*NOTE: Should sub. (2) (a) refer to "quality improvement activity described under sub. (3) (a) 1." or simply to the unqualified term "quality review activity," as in this draft?

(b) The good faith of any person participating in a quality improvement activity shall be presumed in any civil action. Any person who asserts that a person has not acted in good faith has the burden of proving that assertion by clear and convincing evidence.

(c) In determining whether a person acted in good faith under this subsection, the court shall consider whether the person sought to prevent the health care entity that is the subject of the quality improvement activity or its counsel from examining the records used in the quality improvement activity, from presenting witnesses, establishing pertinent facts or circumstances, questioning or refuting testimony or evidence, or confronting or cross-examining adverse witnesses or from receiving a copy of the final report or recommendation resulting from the quality improvement activity.

(3) CONFIDENTIALITY AND PRIVILEGE. (a) Except as provided in sub. (4), all of the following are confidential and privileged; are not subject to discovery, subpoena, or any other means of legal compulsion requiring release or permitting inspection, including compulsion by a state agency; and are not admissible as evidence in any civil, criminal, or other judicial or administrative proceeding:

1. Records and information contained in records that are created, collected, reported, aggregated, or organized by any person as part of a quality improvement activity that is conducted by any person, organization, department, single or joint committee, governing body, or committee of a governing body that is any of the following:

a. A person that has responsibility by statute, regulation, condition of accreditation, bylaw, policy, or resolution to conduct the quality improvement activity, except for state agencies.

Deleted: or organization

b. A person that is charged by a health care entity to conduct the quality improvement activity, [Webster definition of charge: to impose a task or responsibility on <charge him with the job of finding a new meeting place>]

Deleted: directed

Deleted: in which the directing health care entity or another health care entity is the subject of the quality improvement activity

2. A request for records or information made as part of a quality improvement activity described under subd. 1. by a person conducting the quality improvement activity.

3. Notice to a health care entity that the entity is or will be the subject of a quality improvement activity described under subd. 1.

4. The product of aggregating or reorganizing records or information under subs. 1. to 3. that are voluntarily disclosed by a health care entity for the purpose of aggregation or reorganization.

(c) The confidentiality and privilege afforded to records and information under par. (a) is not waived by unauthorized or authorized disclosure of records or information, except as provided under subd. (4)(g).

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(d) Records relating to a quality improvement activity described under par. (a) 1. e. are not subject to inspection or copying under s. 19.35 (1) if the subject of the quality improvement activity is not a government entity.

**(4) EXCEPTIONS TO CONFIDENTIALITY AND PRIVILEGE.** (a) Subsection (3) does not apply to records or information created apart from quality improvement activity that are maintained by or for a health care entity for the particular purpose of diagnosing, treating, or documenting care provided to an individual patient.

(aa) Subsection (3) does not apply to the fact of the failure to renew or the reduction, restriction, suspension, denial, or revocation of any of the things described in sub.

(a)1.-4.

(b) A person mandated by Wisconsin or federal law to report may disclose a record or information from a record that is confidential and privileged under sub. (3) to make the mandated report. A record received by a person pursuant to this subparagraph shall not be subject to sub. (3) or (4).

(c) If a person takes an adverse action against a health care entity as part of a quality improvement activity described under sub. (3) (a) 1., or notifies the health care entity of a proposed adverse action, the person shall, upon request by the health care entity, disclose to the health care entity any records in the person's possession relating to the quality improvement activity that are relevant to the adverse action. Records relating to the quality improvement activity that are relevant to the adverse action are admissible in any criminal, civil, or other judicial or administrative proceeding in which the health care entity contests the adverse action. A person who

has authority to take an adverse action against a health care entity as part of a quality improvement activity described under sub. (3) (a) 1. may at any time disclose to the health care entity records relating to a quality improvement activity that are relevant to a proposed adverse action against the health care entity.

(d) A person conducting a quality improvement activity pursuant to (3)(a)1.a. may disclose the records and information that are confidential and privileged pursuant to (3). ~~[CAN DISCLOSE REGARDLESS OF WHETHER A PROVIDER IS IDENTIFIED FOR THIS PURPOSE.]~~

(e) A person conducting a quality improvement activity pursuant to (3)(a)1.b. may disclose the records and information that that are confidential and privileged pursuant to (3). ~~*if there is written authorization to make the disclosure from the health care entity that charged the person to conduct the quality improvement activity.*~~ ~~[CAN DISCLOSE REGARDLESS OF WHETHER A PROVIDER IS IDENTIFIED FOR THIS PURPOSE.]~~

(g) The confidentiality and privilege afforded to records and information under par. (3) is waived for records widely disclosed to persons that are not health care entities pursuant to subd. ~~(d) and (e)~~

(h) An entity planning an activity that would be quality improvement activity under sub. (3)(a)1. may in advance of the activity designate in writing that sub. (3), and sub. (4)(a)-(g) shall not apply to the records and information in records created, collected, reported, aggregated, or organized by any persons as part of the designated activity.

(5) CONSTRUCTION. This section shall be liberally construed in favor of identifying records and information as confidential, privileged, and inadmissible as evidence.

SECTION 3. 146.55 (7) of the statutes is amended to read:

146.55 (7) INSURANCE. A physician who participates in an emergency medical services program under this section or as required under s. 146.50 shall purchase health care liability insurance in compliance with subch. III of ch. 655, except for those acts or

**Deleted:** to any person conducting quality improvement activity that is described in (3)(a)1. or any health care entity that is identified by name in the records of the quality improvement activity

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**Deleted:** (f) A person conducting a quality improvement activity pursuant to (3)(a)1. may disclose the records and information that are confidential and privileged pursuant to (3). and that also identify a health care provider by name if the disclosing person has written authorization from the health care entity identified or from a person who has legal authority to authorize on behalf of the identified health care entity the disclosure of otherwise confidential and privileged records and information. [THIS ALLOWS FOR PUBLIC REPORTING AND PROVIDES THAT THE IDENTIFIED SUBJECTS NEED TO GIVE PERMISSION.]

**Deleted:** A person conducting a quality improvement activity pursuant to (3)(a)1.a may disclose the records and information that are confidential and privileged pursuant to (3). and that also identify a health care provider by name if there is written authorization to make the disclosure from the health care entity identified, the employer of the health care entity identified, or a parent organization of the health care entity identified . This subd. (f) does not apply to disclosures to a person conducting quality improvement activity described in (3)(a)1. or a health care entity that is identified by name in the records of the quality improvement activity.¶ THIS ALLOWS FOR PUBLIC REPORTING AND PROVIDES THAT THE IDENTIFIED SUBJECTS NEED TO GIVE PERMISSION

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omissions of a physician who, as a medical director, reviews as defined in s. 146.50 (1) (j), conducts a quality improvement activity relating to the performance of emergency medical technicians or ambulance service providers, as specified under s. 146.37 (1g) 146.38 (2).

**SECTION 4.** 187.33 (3) (a) 5. of the statutes is amended to read:

- (h) 187.33 **(3)** (a) 5. Proceedings based upon a cause of action for which the volunteer is immune from liability under s. 146.31 (2) and (3), 146.37 146.38 (2), 895.44, 895.48, 895.482, 895.51, or 895.52.

**SECTION 5.** 187.43 (3) (a) 5. of the statutes is amended to read:

187.43 **(3)** (a) 5. Proceedings based upon a cause of action for which the volunteer is immune from liability under s. 146.31 (2) and (3), 146.37 146.38 (2), 895.44, 895.48, 895.482, 895.51, or 895.52.

**SECTION 6.** 655.27 (1m) (b) of the statutes is amended to read:

655.27 **(1m)** (b) A health care provider who engages in the activities described in s. 146.37 (1g) and (3) a quality improvement activity under 146.38 shall be liable for not more than the limits expressed under s. 655.23 (4) or the maximum liability limit for which the health care provider is insured, whichever limit is greater, if he or she is found to be liable under s. 146.37 146.38, and the fund shall pay the excess amount, unless the health care provider is found not to have acted in good faith during those activities and the failure to act in good faith is found by the trier of fact, by clear and convincing evidence, to be both malicious and intentional.

**SECTION 7.** 655.27 (5) (a) 1. and 2. of the statutes are amended to read:

655.27 **(5)** (a) 1. Any person may file a claim for damages arising out of the rendering of medical care or services or participation in peer review activities a quality improvement activity under s. 146.37 146.38 within this state against a health care provider or an employee of a health care provider. A person filing a claim may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund, the fund is named as a party in the action, and the action against the fund is commenced within the same time limitation within which the action

against the health care provider or employee of the health care provider must be commenced.

2. Any person may file an action for damages arising out of the rendering of medical care or services or participation in peer review activities a quality review

activity under s. 146.37 146.38 outside this state against a health care provider or an employee of a health care provider. A person filing an action may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund, the fund is named as a party in the action, and the action against the fund is commenced within the same time limitation within which the action against the health care provider or employee of the health care provider must be commenced. If the rules of procedure of the jurisdiction in which the action is brought do not permit naming the fund as a party, the person filing the action may recover from the fund only if the health care provider or the employee of the health care provider has coverage under the fund and the fund is notified of the action within 60 days of service of process on the health care provider or the employee of the health care provider. The board of governors may extend this time limit if it finds that enforcement of the time limit would be prejudicial to the purposes of the fund and would benefit neither insureds nor claimants.



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-1965/P5

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Wanted New

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

RMR

Note

Repeal

1 AN ACT to repeal 146.37; to amend 146.55 (7), 187.33 (3) (a) 5., 187.43 (3) (a)  
2 5., 655.27 (1m) (b) and 655.27 (5) (a) 1. and 2.; and to repeal and recreate  
3 146.38 of the statutes; relating to: confidentiality of health care review records  
4 and immunity.

*Analysis by the Legislative Reference Bureau*

*Current law confidentiality and peer review provisions*

Under current law a person who participates in a review or evaluation of the services of a health care provider (a review or evaluation) may not disclose any information acquired in connection with the review or evaluation. Further, records that an organization or evaluator keeps of investigations, inquiries, proceedings and conclusions in connection with a review or evaluation are confidential and may not be used in a civil action for personal injuries against the health care provider. (An "evaluator" is defined as a medical director or registered nurse who coordinates review of an emergency medical services program. "Organization" is not defined. Current law specifies that three particular types of providers are "health care providers," but does not otherwise define "health care provider.")

Current law provides several exceptions to the confidentiality provisions for records and information related to reviews or evaluations, which allow release of information or records to the health care provider who is the subject of the review; to others if the subject of the review or evaluation consents to release; and to the person who requested the review, for use for certain purposes, including improving

the quality of health care. Other exceptions to confidentiality <sup>allow</sup> the release of information that is subpoenaed in a criminal action, the release of information to an examining or licensing board, and the release of information in a statistical report. Current law provides that information or records presented during a review or evaluation are not immune from discovery or use in a civil action simply because they were presented for the review or evaluation. Further, a person who participates in a review or evaluation may testify in a civil action as to matters within his or her knowledge, but may not testify regarding information obtained through the review or evaluation or regarding conclusions of the review or evaluation.

The courts have ruled that records of a review or evaluation conducted by an organization are confidential only if: 1) the review or evaluation is part of a program organized and operated to improve the quality of care of a health care provider; and 2) the person or entity conducting the review or evaluation is part of, or acting on behalf of, a group with relatively constant membership, officers, a purpose, and a set of regulations. The courts have found that the following types of information and records are not confidential or protected: information learned by a hospital administrator in investigating care provided to a patient in a particular incident; a physician's application for reappointment to a hospital staff; information as to whether a hospital investigated a physician or whether the physician's medical privileges were ever limited; and a letter written by a doctor on staff at a hospital to the supervisor of the hospital's residency program that concerned an investigation initiated by the hospital of a resident's performance during a particular incident (in this case, the hospital peer review committee was not convened to investigate). Courts have determined that a review or evaluation by a hospital credentials committee or by the Joint Commission on Accreditation of Healthcare Organizations (a private accrediting body) is confidential and protected.

Finally, current law provides that a person who discloses records or information of a review or evaluation in violation of the confidentiality or privilege provisions is civilly liable for the disclosure.

***Bill provisions concerning confidentiality and privilege***

This bill repeals the confidentiality and privilege provisions related to a review or evaluation of the services of a health care provider and creates a new confidentiality and privilege provision for records and information related to a quality improvement activity. "Quality improvement activity" is defined as any action, such as a review, study, investigation, corrective action, or recommendation, relating to a health care entity and concerning certain topics, including: quality of care; qualifications, competence, and performance of providers; compliance with credentialing, accreditation, or regulatory standards; compliance with legal, ethical, or behavioral standards; utilization of resources; costs; the approval or credentialing of a health care provider or organization; and morbidity or mortality.

Who may be the subject of a quality improvement activity. The bill broadly defines who may be the subject of a quality improvement activity. Potential subjects or, "health care entities," include:

"A"  
from  
page 3

(S) (I)

1. Individuals who must obtain licensure or some other form of certification before providing health care services, such as doctors, nurses, pharmacists, emergency medical technicians, first responders, dieticians, and various therapists.

2. People in training to obtain certification to serve as a health care provider, such as residents.

3. Organizations that provide health care, such as hospitals, clinics, nursing homes, home health agencies, and hospices.

4. People or organizations that are certified by the Department of Health and Family services to provide services under the Medical Assistance program, such as personal care workers and providers of transportation by specialized medical vehicle.

5. A parent organization, subsidiary, or affiliate of a health care entity, such as a company that owns multiple hospitals or clinics.

*Who may conduct a quality improvement activity concerning various health care entities.* The bill specifies that the confidentiality and privilege provisions apply only to a quality improvement activity that is one of the following:

1. A quality improvement activity conducted by a health care entity of health care providers who work for the entity or to whom the entity grants clinical privileges or clinical practice authority. This includes, for example, a review by a hospital of its doctors or nurses or a review by a home health agency of its home health aides.

2. A quality improvement activity conducted by a health care entity of its own performance, or a review of the health care entity by a person or organization to whom the health care entity has granted authority to conduct a review.

3. A quality improvement activity conducted by a fixed or ad hoc committee of a health care entity concerning the health care entity or concerning health care providers who work for the entity or to whom the entity grants clinical privileges or clinical practice authority. This includes, for example, a review by a hospital committee that is not a formal "peer review" committee.

4. A quality improvement activity conducted by a provider who works for a health care entity, or by a provider to whom a health care entity grants clinical privileges or clinical practice authority, of any other provider who works for the health care entity or to whom the health care entity grants clinical privileges or clinical practice authority. This includes, for example, a review by one doctor who is on staff at a hospital of another doctor on staff.

5. A quality improvement activity by a state agency of a health care entity, at the request of the health care entity.

*Protection afforded.* The bill provides several forms of protection for records of quality improvement activities. Under the bill, records of quality improvement activities, and information in those records, are confidential and privileged, are not subject to discovery, subpoena, or other means of legal compulsion requiring release or permitting inspection; and are not admissible in evidence in a civil or criminal action or administrative proceeding.

The protections extend to records or information that is created during or in preparation for a quality improvement activity, as well as to records or information that is presented to a person or organization that conducts or requests the quality

*collected, reported, aggregated, or organized as part of a quality improvement activity.*

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improvement activity. The protections extend to a request for records or information made as part of a quality improvement activity, *also* notice to a health care entity that the entity is or will be the subject of a quality improvement activity, *and* any aggregation or reorganization of other protected records or information. Also, a person who conducts or participates in quality improvement activity may not disclose whether the activity was conducted or any action or lack of action taken as a consequence of the activity. Finally, the protections are not waived by an unauthorized or authorized disclosure of records or information. *generally*

*Exceptions to confidentiality and privilege.* The bill creates several exceptions to the protections afforded to records and information concerning quality improvement activities. Records or information maintained by a health care entity for the particular purpose of diagnosing, treating, or documenting care provided to an individual patient are not protected. A person who is mandated by federal or state law to report information may disclose quality improvement records and information to the extent necessary to make the mandated report. A person who, as a result of a quality improvement activity, takes action to limit or deny a health care entity's ability to serve as a health care entity must disclose relevant quality improvement activity records and information to the health care entity, and such records are admissible in judicial and administrative proceedings. Finally, if either the subject of a quality improvement activity or the the person or organization that conducts or requests the quality improvement activity, depending on the type of activity, provides written authorization to disclose quality improvement activity records or information, the records or information may be disclosed to the extent of the written authorization.

**JNS C** → The bill does not make a person who discloses records or information of a quality improvement activity in violation of the confidentiality and privilege provisions civilly liable for the disclosure.

**Immunity provisions**

Under current law, a person acting in good faith is immune from civil liability for acts or omissions taken while participating in a review or evaluation of the services of health care providers or facilities or of charges for services if the review or evaluation is conducted in connection with a program organized and operated to help improve the quality of health care, to avoid improper utilization of services, or to determine reasonable charges.

The bill provides that a person is immune from civil liability for good faith acts or omissions taken while participating in a quality review activity, as described under the heading "Types of quality improvement activities" *above*, that relates to a health care entity.

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

1 SECTION 1. 146.37 of the statutes is repealed.

1           **SECTION 2.** 146.38 of the statutes is repealed and recreated to read:

2           **146.38 Health care quality improvement activity. (1) DEFINITIONS.** In this  
3 section:

4           (a) “Adverse action” means any action or recommendation to reduce, restrict,  
5 suspend, deny, revoke, or fail to renew any of the following:

6           1. A health care entity’s clinical privileges or clinical practice authority at a  
7 hospital or other health care entity.

8           2. A health care entity’s membership on a medical staff that is organized under  
9 by-laws or in another health care entity.

10           3. A health care entity’s participation in a defined network plan, as defined in  
11 s. 609.01 (1b).

12           4. The accreditation, licensure, or certification of a health care entity.

13           5. Employment of an individual as a health care entity.

14           (b) “Health care entity” means any of the following:

15           1. A health care provider, as defined in s. 146.81 (1), an ambulatory surgery  
16 center as defined in s. 153.01 (1), a home health agency, as defined in s. 50.49 (1) (a),  
17 a home health aide, as defined in s. 146.40 (1) (bm), a hospice aide, as defined in s.  
18 146.40 (1) (bp), a nurse’s assistant, as defined in s. 146.40 (1) (d), an ambulance  
19 service provider, as defined in s. 146.50 (1) (c), an emergency medical technician, as  
20 defined in s. 146.50 (1) (e), a first responder, as defined in s. 146.50 (1) (hm), or any  
21 other person who is licensed, certified, or registered to provide health care services  
22 including mental health services.

23           2. An individual who is enrolled in an education or training program that is  
24 approved by an examining board or affiliated credentialing board in the department  
25 of regulation and licensing or by the department of health and family services and

1 that the individual must complete in order to obtain credentials required of an  
2 individual under subd. 1. ✓

3 3. A person who is certified as a provider of medical assistance under s. 49.45  
4 (2) (a) 11.

5 4. A parent organization, subsidiary, or affiliate of a person described under  
6 subd. 1. or 3.

7 (d) "Quality improvement activity" means an evaluation, review, study,  
8 assessment, investigation, recommendation, monitoring, corrective action, or any  
9 other action, which may include one-time, continuous, or periodic data collection,  
10 relating to any of the following subjects:

11 1. The quality of care provided by a health care entity or the quality of services  
12 provided by a health care entity that have an impact on care. ✓

13 2. Morbidity or mortality related to a health care entity.

14 3. The qualification, competence, conduct, or performance of a health care  
15 entity.

16 4. The cost or use of health care services and resources of a health care entity.

17 5. Compliance with applicable legal, ethical, or behavioral standards for a  
18 health care entity.

19 6. Compliance with credentialing, accreditation, or regulatory standards for a  
20 health care entity and performance of credentialing, accreditation, or regulatory  
21 activities, including compliance with or performance of periodic performance  
22 reviews and related activities for the Joint Commission on Accreditation of  
23 Healthcare Organizations.

24 7. The approval or credentialing of a health care entity.

adverse action

1 (e) "Records" includes minutes, files, notes, reports, statements, memoranda,  
2 databases, findings, work products, and images, regardless of the type of  
3 communications medium or form, including oral communications, and whether in  
4 statistical form or otherwise.

5 (f) "State agency" means a department, board, examining board, affiliated  
6 credentialing board, commission, independent agency, council, or office in the  
7 executive branch of state government.

8 (2) IMMUNITY FOR ACTS OR OMISSIONS. (a) No person acting in good faith who  
9 participates in a quality improvement activity is liable for civil damages as a result  
10 of any act or omission by the person in the course of the quality improvement activity.

described under  
sub.(3)(a)1.

11 Acts or omissions to which this subsection applies include censuring or reprimanding  
12 a health care entity, revoking the hospital staff privileges of a health care entity,  
13 giving notice to the medical examining board or podiatrist affiliated credentialing  
14 board under s. 50.36, or taking any other disciplinary action against a health care  
15 entity.

described under  
sub.(3)(a)1.

16 (b) The good faith of any person participating in a quality improvement activity  
17 shall be presumed in any civil action. Any person who asserts that a person has not  
18 acted in good faith has the burden of proving that assertion by clear and convincing  
19 evidence.

20 (c) In determining whether a person acted in good faith under this subsection,  
21 the court shall consider whether the person sought to prevent the health care entity  
22 that is the subject of the quality improvement activity or its counsel from examining  
23 the records used in the quality improvement activity, from presenting witnesses,  
24 establishing pertinent facts or circumstances, questioning or refuting testimony or  
25 evidence, or confronting or cross-examining adverse witnesses or from receiving a

1 copy of the final report or recommendation resulting from the quality improvement  
2 activity.

3 (3) CONFIDENTIALITY AND PRIVILEGE. (a) Except as provided in sub. (4), all of the ✓  
4 following are confidential and privileged; are not subject to discovery, subpoena, or  
5 any other means of legal compulsion requiring release or permitting inspection,  
6 including compulsion by a state agency; and are not admissible as evidence in any  
7 civil, criminal, or other judicial or administrative proceeding: ✓

8 INS 8-7 →  
9 1. Records and information contained in records that are created or collected  
10 by or presented to a person who requests or conducts any of the following types of  
11 quality improvement activities in preparation for or as part of the quality  
12 improvement activity:

13 a. A quality improvement activity concerning a health care entity that is  
14 conducted by or at the request of a person who employs, contracts with, or grants  
15 clinical privileges or clinical practice authority to the health care entity or by a parent  
16 organization, subsidiary, or affiliate of that person.

17 b. A quality improvement activity that is conducted by the health care entity  
18 that is the subject of the activity, either alone or with another health care entity.

19 c. A quality improvement activity concerning a health care entity, an employee  
20 of the health care entity, a person with whom the health care entity contracts or to  
21 whom the health care entity has granted clinical privileges or clinical practice  
22 authority that is conducted by an employee or a fixed or ad hoc committee of the  
23 health care entity or by a person with whom the health care entity contracts or to  
24 whom the health care entity has granted clinical privileges or clinical practice  
authority.

1 d. A quality improvement activity that is conducted by a person to whom the  
2 health care entity or entities that are the subject of the activity have granted  
3 authority to conduct the activity.

4 e. A quality improvement activity conducted by a state agency at the request  
5 of the health care entity or entities that are the subject of the activity.

6 2. A request for records or information made as part of a quality improvement  
7 activity described under subd. 1. by a person conducting the quality improvement  
8 activity. ✓

9 3. Notice to a health care entity that the entity is or will be the subject of a  
10 quality improvement activity described under subd. 1. ✓

11 4. The product of aggregating or reorganizing records or information under  
12 subds. 1. to 3. that are voluntarily disclosed by a health care entity for the purpose  
13 of aggregation or reorganization.

14 (b) A person who conducts or participates in a quality improvement activity  
15 described under par. (a) 1. may not disclose whether the quality improvement  
16 activity was conducted or disclose action or lack of action taken as a consequence of  
17 the quality improvement activity.

18 (b) (c) The confidentiality and privilege afforded to records and information under  
19 par. (a) is not waived by unauthorized or authorized disclosure of records or  
20 information. A person who receives records or information under par. (a) 1. to 4. may

21 not further disclose the records or information unless permitted to do so under sub.  
22 (4).

23 (c) (d) Records relating to a quality improvement activity described under par. (a)  
24 1. e. are not subject to inspection or copying under s. 19.35 (1) if the subject of the  
25 quality improvement activity is not a government entity.

Except as provided in sub. (4) (g), (c) and ✓

*created a part from the quality improvement that are*

1 (4) EXCEPTIONS TO CONFIDENTIALITY AND PRIVILEGE. (a) Subsection (3) does not  
2 apply to records or information maintained by or for a health care entity for the  
3 particular purpose of diagnosing, treating, or documenting care provided to an  
4 individual patient.

*JWS 10-45*

5 (b) A person mandated by Wisconsin or federal law to report may disclose a  
6 record or information from a record that is confidential and privileged under sub. (3)  
7 to make the mandated report.

*(e), (f), (g), or (h)*

8 (c) If a person takes an adverse action against a health care entity as part of  
9 a quality improvement activity described under sub. (3) (a) 1., or notifies the health  
10 care entity of a proposed adverse action, the person shall, upon request by the health  
11 care entity, disclose to the health care entity any records in the person's possession  
12 relating to the quality improvement activity that are relevant to the adverse action.

*A record received by a person pursuant to this paragraph is not subject to par. (a), (b), (d), or sub. (3).*

13 Records relating to the quality improvement activity that are relevant to the adverse  
14 action are admissible in any criminal, civil, or other judicial or administrative  
15 proceeding in which the health care entity contests the adverse action. A person who  
16 has authority to take an adverse action against a health care entity as part of a  
17 quality improvement activity described under sub. (3) (a) 1. may at any time disclose  
18 to the health care entity records relating to a quality improvement activity that are  
19 relevant to a proposed adverse action against the health care entity.

*proposed adverse action*

20 (d) If the person who conducts or requests a quality improvement activity  
21 described under sub. (3) (a) 1. a., or the health care entity that is the subject of a  
22 quality improvement activity described under sub. (3) (a) 1. b. to e., provides written  
23 authorization for disclosure of records and information related to the quality  
24 improvement activity, the records or information may be disclosed to the extent  
25 allowed in the written authorization.

*JWS 10-25*

1           **(5) CONSTRUCTION.** This section shall be liberally construed in favor of  
2 identifying records and information as confidential, privileged, and inadmissible as  
3 evidence.

4           **SECTION 3.** 146.55 (7) of the statutes is amended to read:

5           **146.55 (7) INSURANCE.** A physician who participates in an emergency medical  
6 services program under this section or as required under s. 146.50 shall purchase  
7 health care liability insurance in compliance with subch. III of ch. 655, except for  
8 those acts or omissions of a physician who, as a medical director, reviews as defined  
9 in s. 146.50 (1) (j), conducts a quality improvement activity relating to the  
10 performance of emergency medical technicians or ambulance service providers, as  
11 specified under s. 146.37 (1g) 146.38 (2). ✓

12           **SECTION 4.** 187.33 (3) (a) 5. of the statutes is amended to read:

13           **187.33 (3) (a) 5.** Proceedings based upon a cause of action for which the  
14 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),  
15 895.44, 895.48, 895.482, 895.51, or 895.52. ✓

16           **SECTION 5.** 187.43 (3) (a) 5. of the statutes is amended to read:

17           **187.43 (3) (a) 5.** Proceedings based upon a cause of action for which the  
18 volunteer is immune from liability under s. 146.31 (2) and (3), ~~146.37~~ 146.38 (2),  
19 895.44, 895.48, 895.482, 895.51, or 895.52. ✓

20           **SECTION 6.** 655.27 (1m) (b) of the statutes is amended to read:

21           **655.27 (1m) (b)** A health care provider who engages in ~~the activities described~~  
22 ~~in s. 146.37 (1g) and (3)~~ a quality improvement activity under 146.38 shall be liable ✓  
23 for not more than the limits expressed under s. 655.23 (4) or the maximum liability  
24 limit for which the health care provider is insured, whichever limit is greater, if he  
25 or she is found to be liable under s. ~~146.37~~ 146.38, and the fund shall pay the excess ✓

1 amount, unless the health care provider is found not to have acted in good faith  
2 during those activities and the failure to act in good faith is found by the trier of fact,  
3 by clear and convincing evidence, to be both malicious and intentional.

4 **SECTION 7.** 655.27 (5) (a) 1. and 2. of the statutes are amended to read:

5 655.27 (5) (a) 1. Any person may file a claim for damages arising out of the  
6 rendering of medical care or services or participation in ~~peer review activities~~ a  
7 quality improvement activity under s. ~~146.37~~ 146.38 within this state against a  
8 health care provider or an employee of a health care provider. A person filing a claim  
9 may recover from the fund only if the health care provider or the employee of the  
10 health care provider has coverage under the fund, the fund is named as a party in  
11 the action, and the action against the fund is commenced within the same time  
12 limitation within which the action against the health care provider or employee of  
13 the health care provider must be commenced.

14 2. Any person may file an action for damages arising out of the rendering of  
15 medical care or services or participation in ~~peer review activities~~ a quality review  
16 activity under s. ~~146.37~~ 146.38 outside this state against a health care provider or  
17 an employee of a health care provider. A person filing an action may recover from  
18 the fund only if the health care provider or the employee of the health care provider  
19 has coverage under the fund, the fund is named as a party in the action, and the  
20 action against the fund is commenced within the same time limitation within which  
21 the action against the health care provider or employee of the health care provider  
22 must be commenced. If the rules of procedure of the jurisdiction in which the action  
23 is brought do not permit naming the fund as a party, the person filing the action may  
24 recover from the fund only if the health care provider or the employee of the health  
25 care provider has coverage under the fund and the fund is notified of the action

1 within 60 days of service of process on the health care provider or the employee of the  
2 health care provider. The board of governors may extend this time limit if it finds  
3 that enforcement of the time limit would be prejudicial to the purposes of the fund  
4 and would benefit neither insureds nor claimants.

5 (END)

2005-2006 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-1965/lins  
RLR:.....

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**Ins B:**

The records of a quality improvement activity are protected if the person who conducts the activity has a responsibility by statute, regulation, bylaw, policy, or resolution or as a condition of accreditation to conduct the activity. Also, records of a quality improvement activity conducted by a person whom a health care entity has charged to conduct the quality improvement activity are protected.

**Ins C:**

*Exceptions to confidentiality and privilege.* The bill creates several exceptions to the protections afforded to records and information concerning quality improvement activities. The bill specifies that records or information created apart from a quality improvement activity and maintained by a health care entity for the particular purpose of diagnosing, treating, or documenting care provided to an individual patient are not protected. The bill provides that a person who is mandated by federal or state law to report information may disclose quality improvement records and information in the records to the extent necessary to make the report and provides that once reported such records or information are no longer confidential or privileged. Under the bill, a person who, as a result of a quality improvement activity, takes action to limit or deny a health care entity's ability to serve as a health care entity must disclose to the health care entity records and information that are relevant to the action, and such records are admissible in judicial and administrative proceedings. Further, the bill specifies that the fact that a person took action to limit or deny a health care entity's ability to serve as a health care entity is not confidential or privileged information.

The bill allows a person who has a responsibility to conduct a quality improvement activity to release records of the activity. Also, a person who is charged by a health care entity to conduct a quality improvement activity may release records of the activity if the health care entity provides written authorization for release. Further, the bill provides that if records are widely distributed under these two exceptions to persons who are not health care providers, the records are no longer confidential or privileged.

Finally, the bill provides that if a person planning to conduct a quality improvement activity waives confidentiality and privilege for records of the quality improvement activity before initiating the activity, then the records are not confidential or privileged.

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**Ins 8-7:**

1. Records and information contained in records that are created, collected, reported, aggregated, or organized by any person as part of a quality improvement activity that is conducted by any person, organization, department, single or joint committee, governing body, or committee of a governing body that is any of the following:

a. A person that has responsibility by statute, regulation, condition of accreditation, bylaw, policy, or resolution to conduct the quality improvement activity, except for a state agency.

b. A person that is charged by a health care entity to conduct the quality improvement activity.

**Ins 10-4:**

(b) Subsection (3) does not apply to the fact of the failure to renew or the reduction, restriction, suspension, denial, or revocation of any thing described under sub. (1) (a) 1. to 4.

**Ins 10-25:**

(e) A person conducting a quality improvement activity pursuant to sub. (3) (a) 1. a. may disclose the records and information that are confidential and privileged pursuant to sub. (3).

(f) A person conducting a quality improvement activity pursuant to sub. (3) (a) 1. b. may disclose the records and information that are confidential and privileged

1 pursuant to sub. (3) if there is written authorization to make the disclosure from the  
2 health care entity that charged the person to conduct the quality improvement  
3 activity.

4 (g) The confidentiality and privilege afforded to records and information under  
5 sub. (3) is waived for records that are widely disclosed under par. (e) or (f) to persons  
6 that are not health care entities.

7 (h) An entity planning an activity that would be a quality improvement activity  
8 under sub. (3) (a) 1. may in advance of the activity designate in writing that sub. (3)  
9 shall not apply to the records and information created, collected, reported,  
10 aggregated, or organized by any person as part of the designated activity.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1965/1dn

RLR:/::...

gs

Representative Underheim:

This draft incorporates changes provided by the Wisconsin Hospital Association (WHA). WHA requested that I not make changes to their language. I do have some comments to offer on the language. In order to get this draft to you this afternoon as you requested, I will provide my comments in separate document.

Robin Ryan  
Legislative Attorney  
Phone: (608) 261-6927  
E-mail: robin.ryan@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1965/1dn  
RLR:cjs:rs

February 1, 2006

Representative Underheim:

This draft incorporates changes provided by the Wisconsin Hospital Association (WHA). WHA requested that I not make changes to their language. I do have some comments to offer on the language. In order to get this draft to you this afternoon as you requested, I will provide my comments in separate document.

Robin Ryan  
Legislative Attorney  
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# State of Wisconsin

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TO: Representative Underheim

CC: Dick Sweet  
Laura Leitch  
Matthew Stanford

FROM: Robin Ryan *RR*

DATE: February 2, 2006

RE: Drafter's note on LRB-1965/1

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Following are my comments on LRB-1965/1 that I referenced in my drafter's note to the bill:

Proposed s. 146.38 (3) (a) 1.

- The introduction to 1. refers to a "single or joint committee." Since a joint committee is a single committee the distinction is not clear.
- Subdivision a. identifies "a person that has responsibility." It is unclear whether "has responsibility" means required or means either required or authorized.
- It is unclear in subdivision a. what a "regulation" encompasses. The Wisconsin Administrative Code consists of rules. The Federal Code of Regulations consists of regulations.
- Subdivision a. refers to a condition of accreditation. It is unclear whose accreditation this refers to. Is it the accreditation of a health care entity? Similarly, subdivision a. refers to a bylaw, policy, or resolution. Should this be a bylaw, policy, or resolution of a health care entity?
- Subdivision a. describes the person that has responsibility by statute, regulation, etc. If a statute states that "a hospital shall do X," and a committee of the hospital does X, is the committee's action covered under subdivision a.? In other words, will the court read

subdivision a. restrictively so that when a person other than the one specifically identified in the statute conducts the activity, the activity is not covered? Such a reading would be similar to the court determining under current law that s. 146.38 only applies when a formal peer review committee conducts a review.

- Perhaps subdivision a. could cover quality improvement activity conducted by a person who is required or authorized by state or federal law, as a condition of accreditation of a health care entity, or under a bylaw, resolution, or policy of a health care entity to conduct the quality improvement activity or by another who acts on that person's behalf.
- Subdivision b. refers to a person who is "charged" by a health care entity to conduct a quality improvement activity. It is my understanding that one of the scenarios WHA wants to cover under this provision is a quality improvement activity conducted by a state agency at the request of a health care entity. I wonder whether a health care entity can "charge" a state agency to act. A prior version of the WHA's language referred to a person "directed" by a health care to conduct a quality improvement activity. My notes from a meeting on January 26, 2006, with WHA indicate to add "authorize." Adding "request" would cover the situation in which a state agency conducts a quality improvement activity at the request of a health care entity.

#### Proposed s. 146.38 (4) (a)

- Proposed sub. (3) makes records created, collected, etc. "as part of a quality improvement activity" confidential and privileged. Subsection (4) (a) is presented as an exception to sub. (3), but it covers records that are created "apart from the quality improvement activity," so it does not serve as an exception to sub. (3).
- If a hospital conducts a quality improvement activity concerning the manner in which doctors write prescription orders, is a particular prescription order created as part of the quality improvement activity or apart from it? If the prescription order is not created apart from the quality improvement activity, then it is confidential and privileged.

#### Proposed s. 146.38 (4) (b)

- The language here is a little cumbersome. Perhaps the following would work: Sub. (3) does not prohibit disclosing that a reduction, restriction, suspension, denial, revocation, or failure to renew an item under sub. (1) (a) has occurred.
- WHA explained that the bill can't simply state that sub. (3) does not prohibit disclosing that an adverse action has been taken, because the definition of adverse action includes a recommendation. Another alternative is to remove "recommendation" from the definition of "adverse action." "Adverse action" is used two places in the bill. First, it is used in the definition of "quality improvement activity." The term "recommendation" is already in the definition of "quality improvement activity." Second, "adverse action" is used in sub. (4) (d), which could be amended to read, "if a person takes an adverse action or makes a recommendation to take an adverse action..."

Proposed s. 146.38 (4) (c)

- The second sentence of sub. (4) (c) provides that a record received by a person pursuant to this paragraph is not subject to par. (a), (b), (d), (e), (f), (g), or (h) or sub. (3). (The language provided by WHA said the records are not subject to sub. (3) or (4). Since it makes no sense to say this paragraph does not apply to a records received pursuant to this paragraph, I changed the reference to sub. (4) to exclude par. (c).)
- The broader point is that the exception only needs to apply to the confidentiality and privilege requirements under sub. (3), not to other exceptions under sub. (4). So should the second sentence instead say, Sub. (3) does not apply to a record that has been disclosed under this paragraph or to information in the record?

Proposed s. 146.38 (4) (e) and (f)

- These paragraphs could be simpler. Since they serve as exceptions to the confidentiality and privilege provided under sub. (3), isn't it sufficient to say that a person conducting a quality improvement activity pursuant to (or "described under," for the sake of consistency) sub. (3) (a) 1. may disclose records of the quality improvement activity or records related to the quality improvement activity.

Proposed s. 146.38 (4) (h)

- This paragraph refers to an activity that "would be quality improvement activity." The activity is a quality improvement activity regardless of whether a designation is made that records of the activity are not confidential or privileged. Also, should "entity" be "person"?

**Northrop, Lori**

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**From:** Thorson, Randy  
**Sent:** Thursday, February 02, 2006 2:55 PM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 05-1965/1 Topic: Health care quality review

Please Jacket LRB 05-1965/1 for the ASSEMBLY.